Supreme Court, U.S.
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No. 93-1128

In the Supreme Court of the United States

OCTOBER TERM, 1993

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 11, 1994
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TABLE OF CONTENTS

Relevant Docket Entries: *	Page
United States Court of Appeals for the Federal Circuit	1
United States Court of Veterans Appeals	3
Record Materials:	
Opinion of the Comptroller General dated June 18, 1930 (9 Comp. Gen. 515) (C.A. App. 92)	6
VA General Counsel's Opinion No. 2-78 (C.A. App. 126)	11

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* The opinions of the Court of Appeals for the Federal Circuit, the Court of Veterans Appeals, and the Board of Veterans Appeals are reprinted in the appendix to the petition for a writ of certiorari, and have not been reproduced here.

TABLE OF CONTENTS—Continued

	Page
VA General Counsel's Precedential Opinion No. 80-90 (C.A. App. 122)	24
VA General Counsel's Precedential Opinion No. 99-90 (C.A. App. 105)	30

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Docket No. 92-7025

FRED P. GARDNER, CLAIMANT-APPELLEE

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
March 9, 1992	Notice of appel [*sic*] filed by Appellee in the US CVA. (lp)
March 11, 1992	Notice of appeal and certified list, received. (lp)
•	• • • • •
March 13, 1992	Notice of appeal and certified list, docketed. Notice sent to the parties. (lp)
•	• • • • •
June 2, 1992	BRIEF FOR APPELLANT, filed. (MS-6/2) (sp)
June 9, 1992	Corrected brief for appellant, rec'd. (MS-6/9) (sp)
•	• • • • •
August 25, 1992	BRIEF FOR APPELLEE, filed. (MS-8/24) (sp)
•	• • • • •

DATE	PROCEEDINGS AND ORDERS
September 10, 1992	REPLY BRIEF FOR APPELLANT, filed. (MS-9/10) (sp)
September 15, 1992	JOINT APPENDIX, filed. (MS-9/15) (sp)
September 24, 1992	Corrected reply brief for appellant, rec'd. (MS-9/23) (sp)
* * * * *	
November 9, 1992	ARGUED. (Archer, Michel and Lourie, JJ) (as)
* * * * *	
September 13, 1993	12. *AFFIRMED.* (ARCHER, J) "JUDGMENT ENTERED" (sk). 5 F3d 1456
October 4, 1993	*ISSUED AS A MANDATE* TO THE COVA. (lp).
* * * * *	
	13. PETITION FOR WRIT OF CERTIORARI FILED 01/11/94, SUPREME COURT #: 93-1128. (EOO 01/26/94 BY JA) 92-7025
	14. PETITION FOR WRIT OF CERTIORARI FILED 01/11/94, SUPREME COURT #: 93-1128. CERT. GRANTED ON 04/04/94. U.S.L.W.: 62-3657 (EOO 04/14/94 BY JA) 92-7025

UNITED STATES COURT OF VETERANS APPEALS

Docket No. 90-120

FRED P. GARDNER, APPELLANT

v.

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, APPELLEE

RELEVANT DOCKET ENTRIES

Date	Filings and Proceedings
02-20-90	Notice of appeal (m-22) (ad)
* * * * *	
03-07-90	Statement of issues (m-15) (mlr)
* * * * *	
07-23-90	Record (m-23) (ad)
* * * * *	
08-02-90	Appellant's brief (m-3) (ad)
* * * * *	
09-26-90	Appellee's brief (m-26) (ad)
10/3/90	SCREENED (mlr)
11/02/90	Order, sua sponte, that this appeal is submitted to a panel comprised of Chief Judge Nebeker, and Assoc. Judges Holdaway and Ivers for decision w/o oral argument (RFC) (ad)

Date	Filings and Proceedings
11/6/90	Order, sua sponte, that appellee file a supple memo by 11/26/90, addressing specific issues; appellant may respond to appellee's supple memo within 20 days after the date of service (Nebeker) (mlr)
	* * * * *
02-05-91	Per Curiam ORD, Sec's Motions of 11/29/90 & 12/26/90 for enlargement of time are moot; fur ord Sec's MO of 1/25/91 for enlargement of time is granted; Sec shall file Memo on or before 2/24/91 (NEBEKER, HOLDAWAY & IVERS) (amc)
02/25/91	Appellee's response to order of the Court to file supple memorandum (m-25) (ad)
03/14/91	Appellant's response to supple memorandum (m-15) (ad)
03/15/91	Per Curiam order, sua sponte, that the Clerk shall inform interested Veteran Service Organizations that, if any a desire to submit their views on the foregoing issue by 3/25/91 (NEBEKER, HOLDAWAY, IVERS) (ad)
3/15/91	Notice to Veterans Organizations in regard to memorandum on an issue before the Court (RFC) (ad)
03/15/91	Per Curiam Ord, sua sponte, that J. Michael Hannon, Esquire, a member of the Bar of District of Columbia, is appointed to file a br as amicus curiae. The brief is due 4-24-91, amicus is requested to present oral argument when the case is scheduled for hearing (NEBEKER, HOLDAWAY, IVERS) (ad)
	* * * * *
6-3-91	Amicus Curiae Brief (m-3) (aw)
	* * * * *
08-07-91	Argued before Chief Judge NEBEKER and A.J.'s HOLDAWAY and IVERS (sae)

Date	Filings and Proceedings
11-25-91	Opinion reversing BVA decision and the matter is remanded for further proceedings (NEBEKER, HOLDAWAY, IVERS) (vm)
	* * * * *
12-09-91	Appellee's MO for Reconsideration or, in the Alternative, for Review en Banc (m-9) (emb)
01-10-92	Per Curiam ord that the Mo for reconsideration is denied; fur ord by the Court en banc that the Mo for review en banc is denied, no judge having called for a vote on the Mo (NEBEKER, KRAMER, FARLEY, MANKIN, HOLDAWAY, IVERS, AND STEINBERG) (vm)
01-13-92	Judgment is hereby entered on 01/10/91 (vm)
03-09-92	Appellee's Notice of Appeal to the U.S.C.A. for the Federal Circuit (m-9) (vm)
03-10-92	Appellee's Notice of Appeal transmitted to the Clerk of the U.S.C.A. for the Federal Circuit (vm)

OPINION OF THE COMPTROLLER GENERAL

(dated June 18, 1930)

[9 Comp. Gen. 515]

(A-31895)

VETERANS' BUREAU—
DISABILITY COMPENSATION

Under section 213 of the World War veterans' act, as amended by the act of March 4, 1925, 43 Stat. 1308, a beneficiary of the Veterans' Bureau who suffers an injury or aggravation of an existing injury as the result of hospitalization furnished by the bureau, may be awarded compensation, if disability is of a compensable degree, even though the disability for which the hospitalization was furnished is later determined not to have been service connected, provided claim is made within two years after the injury or aggravation as a result of hospitalization was suffered.

Comptroller General McCarl to the Director, United States Veterans' Bureau, June 18, 1930:

Consideration has been given to your letter of May 15, 1930, submitting for decision a question presented as follows:

> I have the honor to solicit your decisions on the case of Leon Silver, XC-310SS5, which is now pending in the bureau for adjudication. The facts in this case may be stated as follows:
>
> Leon Silver was called into the service on September 21, 1917, under the selective service act and was discharged "from the draft" on October

13, 1917 by reason of disability. On November 4, 1919 Mr. Silver executed an application for disability compensation alleging a disability of "tuberculosis and chronic ear." Several ratings were made by the bureau holding that the claimant's disability had not been incurred in or aggravated during the period of his service as a draftee, but subsequently the bureau held that an aggravation had taken place during the period of draft service, and the tubercular disability was rated as service connected. The rating of service connection was continued until September, 1920, when after a careful review of the complete file it was held that the disability was not shown to have been incurred in or aggravated by service and service connection was severed.

On January 17, 1924, at which time the disability was rated as service connected, the claimant was hospitalized in the Pacific Branch of the National Home for Disabled Volunteer Soldiers, Los Angeles, Calif., as a bureau patient. He remained in this hospital as a bureau patient until April 17, 1928, when he was discharged against medical advice. While a patient in this hospital the veteran was given X-ray treatments and as a result thereof a disability of dermatitis with ulcerations was incurred.

The question which arises in this case is whether the disability of dermatitis with ulcerations resulting from X-ray treatments can be held to be service connected under the provisions of section 213 of the World War veterans' act, which reads as follows:

"Where any beneficiary suffers or has suffered an injury or an aggravation of an existing

injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him under the vocational rehabilitation act as amended, the war risk insurance act as amended, or this act, or as a result of having submitted to examination under authority of section 303 of the war risk insurance act or section 203 of this act, and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War. The benefits of this section shall be in lieu of the benefits under the act entitled 'An act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916: *Provided*, That application be made for such benefits within two years after such injury or aggravation was suffered or such death occurred or after the passage of this act, whichever is the later date: *Provided further*, That the provisions of section 313 of the war risk insurance act as amended, relating to subrogation, shall be applicable to beneficiaries under this section."

The plain intent of section 213 of the statute, amended, as above quoted, by the act of March 4, 1925, 43 Statute 1308, was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negli-

gence, lack of proper skill, error in judgment, etc., on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment pursuant to an award under either of the acts therein mentioned. That said section was intended to be applicable to all classes of governmental hospitalization authorized under the statute, whether for service-connected or nonservice-connected disabilities, is evident from the specific inclusion of veterans hospitalized under authority of section 203 of the statute which provides for hospitalization, for purposes of observation and examination, of applicants for disability compensation and applicants for treatment under subdivisions (9) and (10) of section 202 of the statute, the latter of which authorizes hospitalization for nonservice-connected disabilities.

In this case hospitalization was authorized as incident to disability compensation then running and which had been awarded pursuant to the terms of the statute as for a disability then recorded as service connected. Hospitalization as incident to receipt of compensation is a right of the beneficiary under the terms of section 202 (6) of the statute. A subsequent finding by the bureau upon review under section 205, that the disability for which compensation had previously been awarded and incident to which the hospitalization had been granted, was not service connected, necessitating discontinuance of compensation, is not "effective until the first day of the third calendar month next succeeding in which such * * * discontinuance is determined." Consequently, such a review and finding of nonservice connection would not invalidate the hospitalization granted during the period the award of compensation had been running; nor is an award of compensation

under section 213 for an injury or aggravation of an existing injury, as a result of such hospitalization, invalidated by the review and finding of non-service connection. Also, an application for disability compensation based on the provisions of section 213 may be entertained even if filed after the disability compensation as an incident of which the hospitalization was furnished may be terminated as a result of review and rerating, if "made * * * within two years" after the injury or aggravation as a result of hospitalization was suffered.

In this case compensation for the disability of "dermatitis with ulcerations resulting from X-ray treatments" may be awarded if of compensable degree the same as though the former disability had been service connected and the discontinuance of compensation therefor had been due to a complete recovery from said disability.

The facts as to the filing of application under section 213 do not clearly appear, and it is to be understood, of course, that unless the application was actually made within two years after the disability from the X-ray treatments was suffered, the benefits provided for under said section may not be granted.

VA GENERAL COUNSEL'S OPINION NO. 2-78

December 15, 1977 (Opinion Date)

October 25, 1978 (Publication Date)

Subject: APPLICATION OF THE TERM "ACCIDENT" AS USED IN VAR 1358(C)(3)

QUESTIONS PRESENTED:

1. Does the word "accident" include surgical accident, that is, unexpected surgical results as opposed to contemplated risks?

2. Is it unnecessary to first find negligence when an accident is found?

3. Is the VA in the position of guarantor of the unexpected results of surgery but not foreseeable risks?

COMMENTS:

This veteran was in a VA hospital for gradual onset of weakness in the left lower extremity. An impression was made of partial transverse myelitis possibly due to surgical intervention, spinal cord tumor, epidural abscess, vascular accident, or multiple sclerosis. Exploratory surgery was performed in February 1954. Following this, there was evidence of increased symptomatology and the surgical wound had to be reopened for the evacuation of a hematoma. The veteran was discharged from the hospital in September 1954 at which time the veteran was able to get about with the assistance of a cane and in a wheelchair.

Based upon an opinion by the Chief Medical Director that the veteran had increased symptomatology

following the surgery, the Director of the Compensation, Pension and Education Service, by administrative review, dated June 12, 1967, held that the injury was the result of a "surgical accident" under VA Regulation 1358(C)(3) and not due to negligence. The case is presently before the Board of Veterans Appeals on a question of retroactive benefits.

The statute applicable to this case, 38 U.S.C. 351, states, in part, as follows:

> "Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment . . . and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter [chapter 11] and dependency and indemnity compensation under chapter 13 of this title [title 38, United States Code] shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. . . ."

A provision similar to the currently existing section 351, supra, was first enacted as section 213, Public No. 242, 68th Congress, the World War Veterans' Act, 1924, as amended (43 Stat. 607). Section 213, supra, was originally enacted on the recommendation of the Veterans' Bureau, the precursor of the Veterans Administration. In testimony before the Committee on World War Veterans' Legislation, House of Representatives, which was considering the bill subsequently enacted as the World War Veterans' Act of 1924, the then Director of the Veterans' Bureau stated, on February 26, 1924, in part, as follows

with respect to the recommendation which later became section 213, supra:

> "This is a new principle but one necessary to the very purpose for which the benefits of these acts are accorded. * * *
>
> ". . . in cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of accident or negligence of treatment or unskillfulness—things that must sometimes happen—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof. The Government having undertaken to bestow a benefit has, in fact, inflicted a loss.
>
> "It is therefore proposed, with proper restrictions safeguarding against double payments of compensation, to authorize in such cases an increase in compensation commensurate with the increased disability." (Page 113, Hearings before the Committee on World War Veterans' Legislation, House of Representatives, 68th Congress, 1st session.)

The 1924 Act was repealed by section 17 of Public 2, 73d Congress, March 20, 1933, 48 Stat. 11, the so-called Economy Act. Thereafter, on March 28, 1934, section 31 of Public Law 73-141 (48 Stat. 526) was enacted, substantially reenacting the original provisions of the law as it existed prior to the Economy Act. Senator Steiwer, who offered the amendment to include such provision, in section 31, supra, in stating the purpose of that section testified as follows:

> "* * * Where a veteran is injured because of malpractice, he shall receive compensation just

the same as though his disability were of war-service origin."

and that

"* * * where, in a veterans' hospital, a veteran is disabled by reason of mistreatment on the part of a Government agent, as in a case of malpractice by a Government surgeon, that disability shall be treated just the same as a war disability . . . ." (Congressional Record, Vol. 78, part 3, page 3289.)

The regulation currently implementing 38 U.S.C. 351 is VAR 1358(C)(3), 38 C.F.R. 3.358(c)(3), which provides:

"Compensation is not payable for either the usual or the unusual after results of approved medical care properly administered, in the absence of a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Veterans Administration."

In Administrator's Decision No. 255 (August 9, 1934), it was determined that by enacting section 31 of Public Law 73-141, Congress apparently intended to reenact the prior existing law (section 213 of the World War Veterans' Act of 1924, as amended). "Accordingly," it was stated in that decision, "the instructions and precedents governing the determination of entitlement to benefits under section 213 of the World War Veterans' Act, as amended, are applicable in determining entitlement to benefits under section 31 of Public No. 141." In that decision it was noted that the Comptroller General of the United

States, in a prior decision rendered on June 18, 1930 (A-31895, 9 Comp. Gen. 515), held that "the plain intent of section 213 of the World War Veterans' Act, 1924, as amended, was to afford veterans some measure of compensation in those cases in which the disability arises through '*accident*, carelessness, negligence, lack of proper skill, error in judgment, etc., on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment pursuant to an award under either of the acts therein mentioned.'" (Emphasis supplied.) The Administrator then held as follows in his August 9, 1934, decision:

"In line with the decision rendered by the Comptroller General on June 18, 1930, and the statements made at the time Public No. 141 was being considered by the Senate as to the purpose of section 31, monetary benefits are not payable as the result of the veteran's death unless it is shown that the death proximately resulted from *accident*, carelessness, negligence, lack of proper skill, error in judgment, *malpractice*, *etc.*, on the part of the person, or persons, charged with a duty respecting his hospitalization or treatment." (Emphases ours.)

As can be seen, the Administrator added the word "malpractice" to the prior construction of section 31, supra. The addition of that word is not deemed to be significant for the purpose of the present discussion since the word "malpractice" is virtually synonymous with "negligence" in this context, and it is noted that the use of the term "accident" was continued.

By memorandum of October 24, 1935, the then Solicitor of the Veterans Administration reviewed for

the Administrator of Veterans Affairs the instructions and precedent decisions issued under and interpreting the provisions of section 31, Public No. 141, 73d Congress. In that memorandum the Solicitor indicated that the original field office adjudications under 213 of the 1924 Act, awarded compensation for additional disability resulting from training, hospitalization, or medical or surgical treatment other than through the veteran's own misconduct, *irrespective of any fault on the part of Veterans' Bureau personnel.* However, it was reported that in 1926 the first regulations relative to compensation awards under section 213, supra, were promulgated. One such regulation was V.B. Regulation No. 157 which authorized the payment of compensation if an additional disease or injury resulted from examination or treatment where there was satisfactory evidence of "malpractice, malfeasance, or misfeasance on the part of the U.S. Veterans' Bureau." The Solicitor reported that that regulation was subsequently challenged as being more restrictive than the law upon which it was predicated, and, thereafter, it was amended with the approval of the General Counsel of the Veterans Administration. The reference to malpractice, malfeasance or misfeasance on the part of Bureau personnel was deleted from the regulations implementing section 213. Following a recounting of the above, the Solicitor then considered the proper construction to be placed on the new regulation R&P, R-1121(B)(4) which read:

> "The usual after results of approved medical care and treatment properly administered will not be held as entitling to payment of compensation under section 213 of the Act."

His opinion as to the proper construction thereof was basically a restatement of the holding in A.D. No. 255 and former conclusions: that neither the usual nor unusual after results of approved medical care and treatment properly administered would be held as entitling payment of compensation under section 213, supra, in the absence of a showing that the disability proximately resulted from accident, carelessness, negligence, etc., on the part of any person or persons charged with a duty respecting hospitalization or treatment of the veteran. In addition, the Solicitor further stated that *the law did not require the claimant to go so far as to show malpractice,* but that it was necessary that there be more than a mere showing that the disability resulted from other than the usual after results of approved medical care and treatment properly administered; that is, there must be a showing of accident, carelessness, negligence, etc., as indicated above. Finally, in concluding that October 1935 memorandum, the Solicitor stated his belief that the rating authorities should be instructed that, in applying the rule laid down therein to an individual case, a considerable degree of liberality should be exercised in evaluating the facts for the purpose of determining whether the disability proximately resulted through carelessness, accident, negligence, et cetera.

In a November 15, 1935, memorandum to the Administrator of Veterans Affairs, the Assistant Administrator referred to the October 24, 1935, memorandum of the Solicitor and indicated his opinion that a narrow construction of the term "accident" to exclude surgical accidents and all other types of accidents that may occur was entirely unwarranted. In response to that November 1935 memorandum, the

then Solicitor, on December 21, 1935 (23 Op. Sol. 552, 553), stated that he had not attempted to define the term "accident" in either the July 5, 1934, opinion, which formed the basis for Administrator's Decision No. 255, or in the memorandum of October 24, 1935. Rather, the Solicitor stated the following:

> "The courts have held that term 'accident' does not have a settled meaning, nor may the meaning of the word as generally used in statutes be determined by any dictionary definition alone, but the meaning of the word is influenced by the provisions of the statute in which it is used, as well as by the purpose for which the statute was enacted. (See 71 Corpus Juris 563: Words and Phrases, Volumes 1, 2, 3 and 4-Series.) The question as to what is an accident, for the purpose of determining entitlement to benefits under section 31, Public No. 141, 73d Congress, is one for determination by the adjudicating agencies."

This memorandum of the Solicitor was approved by the Administrator of Veterans Affairs on December 23, 1935.

As can be seen from the foregoing, the construction or interpretation of the statute, currently codified as 38 U.S.C. 351, has presented substantial difficulties in the past. Some of the difficulty seems to have resulted from the fact that administrative officials have not construed the language of the statute literally in determining whether benefits were payable for additional disability or death due to hospitalization, medical or surgical treatment. Rather, some proof of negligence, malpractice or fault on the part of the Veterans Administration has been deemed to be required prior to any payment of such compensation. (See VAR 1358(C)(3).) The word "accident" is currently employed in the pertinent part of the governing regulation (VAR 1358, paragraph (C)(3)) much as it was used in prior constructions of earlier law, now codified as section 351, supra. However, the concluding part thereof, "or similar instances of indicated fault on the part of the VA," purports to associate the word "accident" with other essentially synonymous words ("negligence," "carelessness," etc.) implying the necessity of the presence of some degree of fault where an individual is accidentally injured due to hospitalization, medical or surgical treatment. Such an association seems contrary to the basic meaning of the word "accident." Moreover, it can be seen, upon a review of the historical development surrounding the repeated use of the words "accident" and "negligence" in earlier years, that the word "accident" was not to be made dependent upon the associated provision "indicated fault on the part of the VA."

In a July 20, 1953, memorandum to the Administrator (XC 3 212 150), the then Solicitor opined that the word "accident" as used in the then applicable regulation (now VAR 1358) referred to an unintended event other than one resulting from negligence, or other fault. It was further indicated in that memorandum that, in the light of the history and construction of the statute, the word "accident" must be given the same meaning as the expression "accidental means" is utilized in insurance contract cases. The Solicitor summarized, in part, as follows:

> "Hence section 31 is applicable only if the injury, (or death), is *caused by* 'accidental means' which *means* arise out of the hospitalization. The conclusion that it was so caused is not legally per-

missible if the result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way. But if, in the act or event which precedes the injury, something unforseen, unexpected, or unsual, occurs, which produces the injury, it properly can be said to have resulted from accidental means. In short, the element of accident must consist in the event which produces (i.e. causes) the injury, rather than in the mere fact that an injury occurs, (the result)."

Footnoting the above, the Solicitor cited several cases, including *United States Mutual Accident Ass'n* v. *Barry*, 131 U.S. 100, 9 S. Ct. 755, 33 L. Ed. 60 (1889).

Administrator's Decision No. 944 (July 26, 1954) approved a portion of the July 20, 1953, memorandum, but no action was taken on the question of what was an "accident" within the meaning of the governing regulations. Prior to the promulgation of A.D. No. 944, the then General Counsel (formerly the Solicitor) in a memorandum to the Administrator dated January 29, 1954, proposed an addition to the then applicable regulation which would have defined the term "accident" essentially as it was stated in the July 20, 1953 memorandum. (See paragraph 11 above.) That proposal was not adopted, and at the conclusion of A.D. No. 944 it was noted that the question of "accident," whether in the popular (e.g., result of negligence) or the legal (i.e., accidental means) connotation, was not involved in that decision.

Upon a careful study of the legislative history of the law which was first enacted in 1924 and has since been codified as section 351 of title 38 of the United

States Code, it is our opinion that Congress intended to authorize the payment of compensation under section 351 for the additional disability or death deriving from an "accident," or in the alternative, from some form of negligence or fault on the part of the Veterans Administration. Based on the testimony of the then Director of the Veterans' Bureau at the hearing at which time the recommendation (ultimately culminating in section 351) was introduced, it appears clear that such legislation was offered for the purpose of having Congress authorize compensation for a veteran's additional disability arising from more than one category of unfortunate circumstance, resulting from hospitalization, medical or surgical care. While the legislative history of the statute indicates a concern for situations arising out of negligence, malpractice or some degree of fault on the part of the Veterans Administration, it does not seem to have excluded situations resulting from non-negligent accidents.

So far as the language of the statute (38 U.S.C. 351) is concerned, there is no requirement contained therein that negligence or other wrongful conduct by a Veterans Administration employee exist as a condition precedent to entitlement to compensation because of injury. Moreover, the precedent opinions cited above, construing the earlier law, place the word "accident" prior to the synonymous terms "carelessness" and "negligence." The ordinary meaning of the word "accident" is opposite that of "negligence," meaning essentially that such event is unforeseen, unexpected or fortuitous. Therefore, the term "accident" is outside the scope of meaning of all of the succeeding terms ("carelessness, negligence, lack of proper skill, error in judgment, etc.") used by the

Comptroller General in the 1930 opinion and by the Administrator in August 1934. (See Black's Law Dictionary, Rev. 4th Ed.; Vol. 1, Words and Phrases, "Accident.")

HELD: 1. Whenever an individual submits to surgical intervention, there are certain ill effects which may flow therefrom even though the operation is performed with the greatest possible degree of skill and precaution and no one is at fault. Such ill effects of surgery, albeit occurring rarely, are contemplated risks which are anticipated as happening in a certain percentage of surgical procedures and considered the normal hazards of surgery. While such occurrences may be designated as medical or surgical accidents by some, they are not true "accidents" within the ordinary meaning of the word, since such untoward results may be looked for or anticipated. Accordingly, it is my opinion that the term "accident" as used in earlier precedent opinions and Veterans Administration Regulation 1358(C)(3) does not include expected or contemplated risks of surgery, no matter how remote. Rather, the term "accident" should be interpreted for Veterans Administration purposes as meaning any unforeseen, untoward result of surgery, medical treatment or hospitalization.

2. In answer to the second question, there is no necessity of showing negligence or fault on the part of the Veterans Administration when an "accident" is found, in order for 38 U.S.C. 351 to be applicable. Such a conclusion broadly construes the statute with a view toward carrying out the apparent intent of Congress without doing violence to the plain language of the Act or disregarding the ordinary meaning of the words used.

3. On the basis of the foregoing, it is my opinion that the Veterans Administration is bound to pay compensation pursuant to section 351 when there exists a proximate, causal connection between any additional disability or death resulting from surgery, and the occurrence of an unforeseen, untoward event ("accident"). Any disability resulting from surgical intervention, which, although unusual, is expected or foreseeable as a normal hazard of surgery, should not produce compensation under section 351 unless the disability results from fault on the part of the Veterans Administration. In this connection, it should be noted that the Veterans Administration is not an absolute guarantor or insurer against additional disability or death occurring during surgical or medical treatment because, in order for section 351 to apply, injury or death must *proximately* result from Veterans Administration hospitalization, medical or surgical treatment, and the fact that injury or death is suffered *coincident* in point of time with such care or treatment does not suffice. (See 49 Op. Sol. 775, 780.)

/s/ Guy H. McMichael III
GUY H. MCMICHAEL III
General Counsel

NOTE: This opinion was released in the form of a memorandum to the Chairman, Board of Veterans Appeals on December 15, 1977.

Distribution: RPC: 0221
FD (02A1C) 25

VA GENERAL COUNSEL'S PRECEDENTIAL OPINION

Date Issued: July 18, 1990 O.G.C. Precedent 80-90
From: General Counsel (02)

SUBJECT: Interpretation of 38 U.S.C. § 410 (b) (1) in Relation to 38 U.S.C. § 351 (This, opinion, previously issued as General Counsel Opinion 5-86, dated January 31, 1986, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Chairman, Board of Veterans Appeals

QUESTION PRESENTED: May the surviving spouse of a veteran entitled to receive disability compensation continuously at the 100-percent rate for 10 or more years under 38 U.S.C. § 351, whose death was neither service-connected nor due to the disability for which compensation was paid under section 351, qualify to receive Dependency and Indemnity Compensation (DIC) under 38 U.S.C. § 410(b)(1)?

COMMENTS: For reasons that follow, the answer is yes. The veteran was, for more than 10 years preceding the veteran's death, continuously entitled to receive disability compensation at the 100-percent rate, under 38 U.S.C. § 351, because of disability that resulted from hospital treatment by the Veterans Administration (VA), independent of the veteran's service-connected disability. The veteran died May 27, 1984, because of illness unrelated either to the veteran's service-connected condition or the

condition for which compensation had been paid under section 351.

Section 351 states in pertinent part:

> "Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, [. . .] and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation [. . .] and dependency and indemnity compensation . . . shall be awarded in the same manner *as if* such disability, aggravation, or death were service-connected [. . . .]" (Emphasis added.)

Clearly, DIC would not be payable under section 351 in this case, because the disability for which the veteran qualified under section 351 was not a contributory cause of death. Nor would benefits be payable under section 410(a), which confers DIC eligibility for service-connected deaths. Therefore, entitlement to DIC, if it exists, must be found under section 410 (b)(1). Even so, as we shall discuss, the history of section 351 provides a helpful backdrop for proper construction of section 410(b)(1).

Section 410(b)(1) of title 38 states in pertinent part:

> "[W]hen any veteran dies, [. . .] if the veteran was in receipt of or entitled to receive [. . .] compensation at the time of death *for a service-connected disability* that [. . .] was continuously rated totally disabling for a period of ten or more years immediately preceding death, [. . .] the Administrator shall pay [. . .] [DIC] to the veteran's surviving spouse, [. . .] in the same

manner *as if* the veteran's death were service-connected." (Emphasis supplied.)

If those words were to be given a literal construction, DIC could not be paid in this case, as the veteran's section 351 entitlement for which compensation was paid did not exist because of a service-connected disability but because the veteran's treatment-derived disability was considered "as if" it were service connected, that is, quasi-service connected (see section 351, *supra*). However, it has long been held that the words of a statute are not always to be given their literal meaning. The Supreme Court, in 1922, held that where a literal construction "leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further." *Ozawa v. United States*, 260 U.S. 178, 194. Sections 351 and 410(b)(1) stand *in pari materia* and thus should be construed together. 2A *Sutherland Stat. Construction* § 51.01 (4th ed. 1984). As will be discussed, there would be a manifest inconsistency, which we believe Congress did not intend, between these provisions if section 410(b)(1) were interpreted to mean that survivors of veterans who drew disability compensation for service-connected disability could qualify for DIC, but survivors of veterans who drew disability compensation for quasi-service-connected disability could not.

The pertinent language of section 351 is essentially the same as that introduced into veterans' benefits law by section 213 of the World War Veterans' Act, 1924 (Ch. 320, 43 Stat. 607, 623). Both the language and history of the provision make clear that Congress intended that *all* veterans' monetary benefits payable for service-connected disability or death be payable for qualifying disability or death resulting from, among other things, medical examination or treatment in the same manner as though the disability or death had been a result of military service.* [* Provision is also made for such veterans' medical care. 38 U.S.C. § 610(a)(3).] *See* S. Rep. No. 397, 68th Cong., 1st Sess. 5 (1924); *Proposed Legislation as Recommended by the Director of the United States Veterans' Bureau, et al.: Hearings of H.R. 7320 Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess. 113 (1924). It would be impossible to achieve such result, insofar as DIC entitlement under section 410(b)(1) is concerned, if DIC were payable to the survivors of those who had been rated totally disabled for the requisite time because of service-connected disability, but not to the survivors of those who had been so rated for the requisite time because of quasi-service-connected disability.

We do not believe Congress intended such inconsistent result. "Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of both, *without expressly recognizing the inconsistency*" (emphasis supplied.) *Sutherland, supra.* We believe that under this principle, if Congress had intended to preclude such payment, it would have expressed recognition of the inconsistency by specifically excluding such class of claimants from section 410(b)(1) coverage, which it did not do. "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" *Steelworkers v. Weber*, 443 U.S. 193, 201 (1979), quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1982). Furthermore, nothing in the history of the

provision indicates that Congress intended to create such exclusion. *See* history of Pub. L. No. 95-479, *infra*.

Section 410(b)(1) is in the nature of remedial legislation. *See* history of Pub. L. No. 95-479, § 204 (1978), S. Rep. No. 1054, 95th Cong., 2d Sess. 27-31, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3485-3489, wherein the Senate Committee on Veterans' Affairs went on record observing, "The appropriate Federal obligation to these survivors should . . . be the replacement of the support lost when the veteran dies," that is, "to provide income security to the survivors." As section 351 provides for quasi-service-connected disability, section 410(b)(1) provides for quasi-service-connected death. Such remedial legislation is to be broadly construed. (Indeed, section 351 was also characterized as remedial at its inception. S. Rep. No. 397, *supra*, at 1.) *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Similarly, the statute is entitled to expansive construction by virtue of its being in the nature of a public benefit, 2A *Sutherland*, *supra*, at § 54.05, and because of long-standing policy set forth in VA regulations, at 38 C.F.R. § 3.102. The intent of the legislature is paramount in statutory construction, and that intent may, as would be the case here, be defeated by giving a statute a too-literal interpretation. Equity sometimes requires enlargement of the letter of a statute so as to give effect to the legislative intent. *Beley v. Naphtaly*, 169 U.S. 353, 360 (1898). We believe, in light of what has been said, the references to service connection in the statute and in its history must be seen as merely descriptive of the usual basis upon which disability compensation is awarded, and not intended to preclude the entitlement of the section

410(b)(1) benefit to otherwise qualified survivors of veterans whose permanent disabilities were quasi-service-connected under section 351.

HELD: The surviving spouse of a veteran entitled to receive disability compensation continuously at the 100-percent rate for 10 or more years under 38 U.S.C. § 351, whose death was neither service connected nor due to the disability for which compensation was paid under section 351, may qualify to receive DIC under 38 U.S.C. § 410(b)(1).

/s/ Raoul L. Carroll
RAOUL L. CARROLL

VA GENERAL COUNSEL'S PRECEDENTIAL OPINION

DEPARTMENT OF
VETERANS AFFAIRS

Memorandum
O.G.C. *Precedent Opinion* 99-90

December 24, 1990

From General Counsel (022)

Sub. Benefits under 38 U.S.C. § 351 for HIV infection acquired through blood transfusion; CHRISTIAN, C. SS 587 50 5666; KNIPPER, A. XC 11 992 383; ROBINSON, T. XSS 224 16 9712

To: Chairman, Board of Veterans Appeals (01)

QUESTION PRESENTED:

May the term "accident," as used in 38 C.F.R. § 3.358(c)(3) concerning medical and surgical procedures and care, include events which by their nature are only remotely foreseeable?

COMMENTS:

1. Your opinion request of December 18, 1989, involves three claims for benefits under 38 U.S.C. § 351 which are currently on appeal to the Board of Veterans Appeals. In reviewing the questions raised in your request, we wish to emphasize that we have not attempted to make any factual determinations in the cases. The responsibility for such determination rests with the Board.

2. The first veteran received blood transfusions during VA hospitalizations in 1978 and 1979. Acquired

immunodeficiency syndrome (AIDS) was diagnosed in June 1986 and the veteran died in July 1986. The second and third veterans received blood transfusions during VA hospitalizations in May and September 1984, respectively. One was diagnosed as having AIDS in July 1985 and died in February 1986. The other tested positive for human immunodeficiency virus (HIV) in September 1985. Service connection has not been established for any disability in these cases. It will be assumed, for purposes of this opinion, that all three veterans contracted HIV, which causes AIDS, as a result of blood transfusions properly administered during their VA medical and/or surgical treatment. Whether this assumption is correct with respect to any or all of these cases is, of course, a factual issue for resolution by the Board.

3. Monetary benefits are available pursuant to 38 U.S.C. § 351 for disability caused by "injuries" resulting from VA medical and surgical care. The regulatory framework developed by VA to implement this provision is contained at 38 C.F.R. § 3.358. Pertinent to this opinion is the limitation at subsection 3.358(c)(3):

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "*accident*" (an unforeseen, un-

> toward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

(Emphasis added.) Thus, benefits under 38 U.S.C. § 351 are currently payable, pursuant to 38 C.F.R. § 3.358, for additional disability resulting from VA medical treatment which is not properly administered or in the event of an "accident." Since a 1978 General Counsel Opinion, "accident" has been considered to mean "any unforeseen, untoward result of surgery, medical treatment or hospitalization." Op. G.C. # 2-78 (10-25-78). This interpretation has removed from consideration all types of "accidents" which represent foreseeable, however remotely so, consequences of medical care and treatment. As the facts you present do not suggest that these three veterans received less than proper medical care, we will narrow our focus to consideration of the term "accident" as employed in the regulation.

4. In applying the definition of "accident" currently contained in 38 C.F.R. § 3.358(c)(3) to the claims before us, we note that the two veterans who received blood transfusions in 1984 did so at a time when it was rapidly being accepted by the medical profession that infection with HIV could occur as a result of a blood transfusion. Even the veteran who received transfusions in 1978 and 1979, well before AIDS had become recognized as a disease entity, could be held to have contracted a disability which was "foreseeable" in that all invasive procedures are known to involve a risk of infection. **In view of the restrictive nature of VA's regulation in this regard, evaluation of its genesis is warranted.**

5. We begin by reviewing the applicable legislative history of section 351. A provision similar to the current version of 38 U.S.C. § 351 was first enacted in 1924, on recommendation of the Veterans' Bureau. *See* The World War Veterans' Act, Pub. L. No. 68-242, sec. 213 (1924). It provided:

> That where any beneficiary of this bureau suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him by the director and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War.

General Frank T. Hines, then Director of the Veterans' Bureau, explained in a letter dated December 3, 1923 to the Chairman of the Select Committee on Investigation of the United States Veterans' Bureau, that the Bureau favored "and recommended" a proposal of the Disabled American Veterans that any person who suffered an injury due to his work or study in line with, or caused by his vocational training or placement training, be compensated. Of that proposal, he stated:

> This is new. I concur in the principle that authority should exist for compensating the cases of disability due to the hazards of training upon the general theory and principle of the workmen's compensation act. I would extend the principle beyond this particular proposal to include

> also ratable disabilities incurred without fault and due to the hazards of medical and surgical treatment. It seems that the whole purpose of giving such treatment or of giving training is defeated if, in the course of the training or treatment, a disability is incurred without fault and due solely to the training and treatment for which there is no authority to compensate because of course, such disability is not directly connected with the service. I recommend this principle to your thoughtful consideration.

Reprinted in Hearings before the House Committee on World War Veterans' Legislation, 68th Congress, 1st Session, conducted in February 1924 on H.R. 7320, at 122. In testimony before the Committee on World War Veterans' Legislation, General Hines explained the need for the benefit in this manner:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of *accident* or negligence of treatment or unskillfulness—things that must sometimes happen—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof.

(Emphasis added.) Hearings before the House Committee on World War Veterans' Legislation, 68th Congress, 1st Session, at 112 (Feb. 26, 1924). During that same hearing, in a subsequent exchange, General Hines acknowledged upon further questioning that "greater disability" sometimes occurs despite a veteran having received "the best medical advice" and after a doctor "does the best he can and without neglect." 1924 Hearings, *supra*, at 114.

6. This legislative history reflects that disability stemming from non-negligent events was contemplated by those seeking enactment of the measure and the word "accident" was the term employed to describe that "branch" or class of events.

7. Section 213 was repealed by Public Law No. 73-2, 48 Stat. 14 (1933). Then, in 1934, Senator Steiwer, by offering an amendment to H.R. 6663 (which became Public Law No. 73-141) effected a reenactment of the provision. However, his description of the measure reflected a more restricted view of its coverage:

> The first merely provides, in effect, that where a veteran is injured because of malpractice, he shall receive compensation just the same as though his disability were of war-service origin . . . [W]here, in a veterans' hospital, a veteran is disabled by reason of mistreatment on the part of a Government agent, as in a case of malpractice by a Government surgeon, that disability shall be treated just the same as a war disability, and the veteran shall be compensated in the same way.

78 Cong. Rec. 3289 (Feb. 27, 1934). Upon questioning as to how it would be determined that there had been a case of malpractice, Senator Steiwer answered:

> I do not know what the Veterans' Administration can determine that there has been a case of malpractice, but they do determine that the veteran is suffering from disability, and in some cases they have determined that the disability was caused by or aggravated by some mistreatment upon the part of the veterans' agencies. I do not think there has ever been any trial of a doctor

> to determine malpractice, and I am told—and I ought to say in fairness to the Veterans' Administration—that in recent years there have been very few of these unfortunate cases . . . who have suffered at the hands of Veterans' Administration physicians. They were swept off all the rolls by the Economy Act. We seek by this amendment to put that little group back where they can be dealt with generously by their Government.

78 Cong. Rec. 3289-90. On that same date, Senator Steiwer referred to what he had previously stated as the explanation of this provision. He stated, "I shall not explain it further, except to say that the language employed in this amendment, as nearly as I can remember, is a mere reenactment of the law as it existed prior to the Economy Act." 78 Cong. Rec. 3298 (Feb. 27, 1934). Thus, the legislative history surrounding reenactment of this provision must be considered somewhat ambiguous.

8. The provision described by Senator Steiwer became section 31 of Public Law No. 73-141, 48 Stat. 526 (1934):

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits . . . benefits . . . shall be awarded in the same manner as if such disability, aggravation, or death were service connected.

This is almost identical to the current language of 38 U.S.C. § 351. Congress expanded its provisions in 1940 to include veterans who sustain injuries as a result of examinations, Pub. L. No. 76-866, sec. 12, 54 Stat. 1193, 1197 (1940), and in 1943 to include veterans who suffer additional injury as a result of vocational rehabilitation, Pub. L. No. 78-16, sec. 4, 57 Stat. 43, 44 (1943). Also, an offset against amounts awarded as a result of an action under the Federal Torts Claims Act was provided in 1962. Pub. L. No. 57-825, 76 Stat. 948 (1962).

9. The original construction placed on section 213 by the Veterans' Bureau was a broad one. An outline of the history of that original construction is provided in a memorandum of October 24, 1935 of the then Solicitor of the Veterans Administration (VA) and this opinion will not recite all the details. However, we note that the Solicitor acknowledged in his memorandum the role played by an early Comptroller General opinion in providing VA with its regulatory language, including the word "accident."

10. Specifically, Comptroller General Decision No. A-31895, 9 Comp. Gen. 515 (1930) considered the issue of whether a veteran could be granted compensation under section 213 of the World War Veterans' Act of 1924, for a disability resulting from hospitalization awarded the veteran for treatment of an existing disability, which at the time of treatment was considered to be service connected but was subsequently determined to be non-service connected. The Comptroller General held that compensation under section 213 was payable notwithstanding the breaking of service connection. In addition to that holding, the decision contained the statement that "the plain intent of section 213 of the World War Veterans' Act, 1924, as amended, was to afford veterans some measure of compensation in those cases in which the disability arises through *accident*, carelessness, negli-

gence, lack of proper skill, error in judgment, etc. . . ." (Emphasis added.) The statement was gratuitous and largely irrelevant *obiter dictum*. However, it was cited in Administrator's Decision No. 255, dated August 9, 1934, and was relied upon to support a holding that section 213 benefits were payable *only* when the disability arose through accident, carelessness, negligence, etc. Although, the precise question was not before the Comptroller General, this statement did reflect a contemporaneous interpretation of the congressional intent behind the unique benefits granted by the provisions of section 213, Pub. L. No. 68-242. In the same way, the Administrator's 1934 decision (No. 255) represents a contemporaneous interpretation of the "reenactment" statute, a slightly different version from that of 1924. The Administrator was of the opinion that:

> It is apparent that it was the intent of Congress to reenact the law as it existed in section 213 of the World War Veterans' Act, 1924, as amended, prior to the approval of Public No. 2, Seventy third Congress. Accordingly, the instructions and precedents governing the determination of entitlement to benefits under section 213 of the World War Veterans' Act, as amended, are applicable in determining entitlement to benefits under section 31 of Public No. 141.

Administrator's Decision No. 255 (8-9-34).

11. Perhaps the best summary of the position VA finally took in interperting this statute is contained in the Solicitor's Memorandum of October 24, 1935:

> [T]he law does not require the claimant to show malpractice but . . . there must be more than a mere showing that the disability resulted from

> other than the usual after results of approved medical care and treatment properly administered. There must be a showing of *accident*, carelessness, negligence . . . (emphasis added).

Chairman, Board of Veterans Appeals (01)

However, this view had altered by July 1953, as shown in a memorandum on the subject from the then Solicitor to the Administrator. It was his position that section 31 was applicable only if injury, or death, were caused by "accidental means," an expression utilized in insurance contract cases. That is, "if in the act or event which precedes the injury, something unforseen, unexpected, or unusual occurs, which produces the injury, it properly can be said to have resulted from accidental means." Solicitor's Memorandum of July 20, 1953.

12. In February 1961, VA amended part 3 of title 38, Code of Federal Regulations. Then, new section 3.358 included the following provision:

> Compensation is not payable for either the usual or unusual after results of approved medical care properly administered, in the absence of a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Veterans Administration.

26 Fed. Reg. 1590-91 (Feb. 24, 1961). As noted in the General Counsel opinion of October 25, 1978, this regulatory language equated "accidents" with instances of "indicated fault" (in terms of giving rise to compensation eligibility). As accepted in that opinion, the "ordinary meaning of the word 'accident'

is opposite that of 'negligence.'" Op. G.C. #2-78. One holding in the 1978 opinion was that:

> [T]here is no necessity of showing negligence or fault on the part of the Veterans Administration when an "accident" is found . . . . Such a conclusion broadly construes the statute with a view toward carrying out the apparent intent of Congress without doing violence to the plain language of the Act or disregarding the ordinary meaning of the words used.

Op. G.C. #2-78 (10-24-78). We agree with that particular conclusion in the opinion. However, the definition of "accident" contained therein, "any unforeseen, untoward result" and the regulatory provision resulting therefrom, 43 Fed. Reg. 51015 (11/2/78), do not allow grants of benefits in certain cases we believe fall reasonably within the realm contemplated by Congress when creating this benefit. Specifically, we do not believe the statute should be read as failing to authorize compensation for injuries resulting from events which are to *any* degree foreseen or forseeable. Perhaps the problem results from advances in medical technology. While still falling short of providing us with a total understanding of the workings of the human body and the diseases that prey upon it, scientists have provided us with a thorough understanding of the multiplicity of "risks" inherent to medical/surgical intervention and care. Currently, it seems that almost no medical event, including the AIDS phenomenon, is now totally "unforeseeable."

15. Having recognized that the current regulatory definition of "accident" is too restrictive in view of the legislative history of 38 U.S.C. § 351, we are tasked with providing a "definition" which will aid

in the case-by-case application of those provisions. To this end, we suggest that it is appropriate to consider claims initially for indications of carelessness or other "indicated fault." If none is found, the fact-finder must review the evidence surrounding the veterans' medical and surgical care seeking to determine whether "accidents" occurred. That is, were there any events which were truly unexpected or not reasonably foreseeable and which involved additional "injury?" This reasoned approach does not represent a literal, *i.e.*, strict-liability, interpretation of section 351. For instance, medical procedures often involve a common and, thus, clearly-recognized risk of additional injury. Such results, although representing an undesired outcome of treatment, should not be viewed by a fact-finder as an accident because their occurrence was reasonably foreseeable. Also, in cases where the only treatment that can possibly arrest a life-threatening condition involves a high risk of additional injury or death, in our view, the circumstances involved in such cases dictate only one reasonable conclusion, that the additional injury or death should be considered to result from the disease or injury itself rather than be classified as an "accident."

16. Appropriate amendment along these lines is being recommended to the Veterans Benefits Administration and will provide rating personnel, as well as the Board, the guidance needed to avoid absurd results, while providing claimants with the compensation statutorily authorized under Section 351.

HELD:

The provisions of 38 C.F.R. § 3.358(c)(3) divide events into two categories, those occurring due to improper or negligent care and those considered "ac-

cidents." This latter term was previously defined by the General Counsel as including only unforeseen, untoward results of surgery, medical treatment or hospitalization and not including expected or contemplated risks of surgery, no matter how remote. In view of the legislative history of 38 U.S.C. § 351, this definition has proven too restrictive to serve as a guideline in awarding benefits under this statute. Instead, those charged with consideration of claims for benefits under 38 U.S.C. § 351 must consider the consequences of medical and surgical care in the light of whether they are unexpected or not reasonably foreseeable. Thus, if it is determined an individual is infected with human immunodeficiency virus as a result of a blood transfusion administered by VA at a time when that type of infection as a result of blood transfusions was not *reasonably* foreseeable—an accident—that individual may receive benefits under 38 U.S.C. § 351.

/s/ Raoul L. Carroll
RAOUL L. CARROLL

Attachment: C-files (3)

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